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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DILLON MICHAEL WILLIAMS, Defendant and Appellant.	A125457 (Sonoma County Super. Ct. Nos. SCR-31810, SCR-32983, SCR-472859)

In a consolidated hearing in Sonoma County, defendant Dillon Michael Williams was sentenced in connection with four criminal convictions, one in Marin County and three in Sonoma County. He contends on appeal that the sentencing court improperly calculated his custody credits, and that it erred in imposing fines pursuant to Penal Code[1] section 1202.4. We conclude that defendant is entitled to actual time credit (but not work or conduct credit) for the time he spent in custody before he was initially sentenced in Marin County, that he is entitled to credit for the time between his initial sentencing and the consolidated sentencing, and that the recent amendments to section 4019 should be applied retroactively. We also conclude that the Sonoma County Superior Court improperly imposed restitution and parole revocation fines that were different from those imposed earlier in the three Sonoma County cases.

[1] All undesignated statutory references are to the Penal Code.

I. BACKGROUND

A. Defendant's Crimes

In 2002, defendant pled guilty to grand theft (§ 487, subd. (a)) in Sonoma County case No. SCR-31810.[2] The trial court suspended imposition of sentence, placed him on probation, and imposed a restitution fine of $200 (§ 1202.4) and a parole revocation fine of the same amount (§ 1202.45).

In 2003, in Sonoma County case No. SCR-32983, defendant pled no contest to a new theft offense (§ 485), and admitted violating probation. The court suspended execution of sentence, placed defendant on probation, and imposed a $200 restitution fine, plus a 10 percent administration fee (§ 1202.4) and a $200 parole revocation fine (§ 1202.45).

In 2006, in Sonoma County case No. SCR-472859, defendant pled guilty to inflicting corporal injury on a spouse or cohabitant. (§ 273.5, subd. (a).) The court imposed sentence in cases Nos. SCR-31810 and SCR-472859, ordered the previously imposed sentence in case No. SCR-32983 executed, suspended execution of sentence, and committed defendant to the California Rehabilitation Center (CRC) as an addict. (Welf. & Inst. Code, § 3051.) The court also imposed a $660 restitution fine (§ 1202.4) and a parole revocation fine in the same amount (§ 1202.45). Defendant was released on parole in April 2007.

A CRC hold was placed on defendant on December 5, 2007. He was booked in Marin County for identity theft (§ 530.5) on December 21, 2007, based on an offense that took place on November 20, 2007 (Marin County case No. SC157013A (the Marin action)). He was convicted in the Marin action on June 18, 2008.

B. Sentencing in the Marin Action

The Marin County Superior Court sentenced defendant on November 5, 2008, to a prison term of three years for the identity theft and a prior prison term enhancement

[2] The facts of the underlying cases are not relevant to this appeal. We shall recite the procedural history of the cases only to the extent it is relevant to the limited issues on appeal.

(§ 667.5, subd. (b)) and imposed $800 restitution and parole revocation fines (§§ 1202.4, 1202.45). The court awarded him 323 actual days credit, plus 160 conduct days, for a total of 483 days. He was admitted to state prison on November 18, 2008, pending discharge from CRC, and the civil addict commitment was later vacated.

C. Consolidated Sentencing in Sonoma County

The Sonoma County Superior Court held a consolidated sentencing hearing on June 30, 2009. The court imposed an aggregate term of seven years four months, calculated as the aggravated term of three years in case No. SCR-32983; a concurrent three-year term in case No. SCR-472859; a consecutive eight-month term, one-third the midterm, in case No. SCR-31810; a consecutive eight-month term, one-third the midterm, in the Marin County action; and one year for each of three prior convictions. The court awarded 243 days credit in case No. SCR-31810, 678 days in case No. SCR-32983, and 678 days in case No. SCR-472859; and acknowledged that defendant had received 483 days of credit in the Marin action.[3] In addition, the court imposed restitution fines of $400 in case No. SCR-31810, $1,000 in case No. SCR-32983, and $600 in case No. SCR-472859 (§ 1202.4), and parole revocation fines of the same amounts (§ 1202.45); the court also reimposed the $800 restitution and parole revocation fines in the Marin action.

II. DISCUSSION

A. Presentence Credit

At the consolidated sentencing hearing, the trial court noted that defendant had been awarded 483 days in actual and conduct credit in the Marin action. Defense counsel pointed out that when defendant was originally sentenced in the Marin action, his prison term exceeded the custody credits; in the consolidated sentencing, however, the sentence in the Marin action was treated as a subordinate term, with an eight-month sentence. As a result, he argued, after the consolidated sentencing, the custody credits in the Marin

[3] The abstract of judgment following the consolidated sentencing hearing in Sonoma County reflected a credit of 483 days in the Marin action.

action would exceed the sentence in that action, and "those credits should go somewhere." The court indicated that defendant had been accruing credits from the date of sentence and that any days of credit in the Marin action that exceeded the eight-month sentence would be applied to defendant's parole period. The court, however, did not calculate the time defendant had accrued since the original sentencing in the Marin action, and the abstract of judgment did not reflect additional credits in the Marin action for the time between the Marin sentencing hearing and the consolidated sentencing hearing.

Defendant contends the trial court erred in allocating the credits for the period from December 21, 2007, to November 5, 2008, only to the Marin action. Section 2900.5 governs the award of presentence custody credits. (*People v. Gonzalez* (2006) 138 Cal.App.4th 246, 252 (*Gonzalez*).) Section 2900.5, subdivision (b) provides that credit under section 2900.5 is given "only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed.' "

The court in *Gonzalez* recognized that it can be difficult to apply section 2900.5 " 'when, as often happens, the custody for which credit is sought had multiple, unrelated causes.' " (*Gonzalez, supra*, 138 Cal.App.4th at p. 252, quoting *People v. Bruner* (1995) 9 Cal.4th 1178, 1180 (*Bruner*).) The defendant in *Gonzalez* spent time in county jail awaiting disposition of three different criminal cases, in all of which he was convicted. (*Gonzalez, supra*, 138 Cal.App.4th at pp. 248-250.) The court allocated the defendant's conduct credits to two of the actions, but not to the third (an auto theft and gun case), and a number of credits remained unused—that is, the number of credits allocated to one of the sentences (a domestic violence case) exceeded the sentence to which it was applied. (*Id*. at pp. 250-251.) The Court of Appeal noted that the time the defendant spent in custody was attributable to both the auto theft and gun case and the action to which the credits in question were applied, and concluded that the trial court had erred in failing to allow the defendant any custody credits in the auto theft and gun case. (*Id*. at pp.

252, 254.) In doing so, the court stated: "[T]he choice in this case is not between awarding credit once or awarding it twice. The credits for the [relevant] period of incarceration were only awarded against a single case, the domestic violence case. However, once the few days of custody left to complete the sentence in the domestic violence action were credited to defendant, the remaining custodial time should have been characterized as solely attributable to the auto theft and gun case and allocated accordingly. Otherwise the vast majority of the time served during the [relevant] period of incarceration would become 'dead time' that was not attributable to any case . . . ." (*Id.* at p. 254.)

In re Marquez (2003) 30 Cal.4th 14 (*Marquez*) is also instructive. The petitioner there posted bail after being arrested for an offense in Monterey County. Shortly afterward, he was arrested for a separate offense in Santa Cruz County, and remained in continuous custody from that time on. Monterey County thereafter placed a hold on him. (*Id*. at p. 17.) The petitioner was convicted in Santa Cruz County and sentenced to prison. He was then sent to the Monterey County jail to face the charge there, convicted, and sentenced to prison. The Santa Cruz County conviction was reversed on appeal, and the charges were subsequently dismissed. (*Id*. at p. 18) Our Supreme Court concluded he was entitled to credit against his Monterey sentence for the time he spent in custody between the date he was sentenced in Santa Cruz County and the date he was sentenced in Monterey County, reasoning that as of the time Monterey County put a hold on the petitioner, "his custody became attributable to the pending criminal charges in *two* counties: Monterey and Santa Cruz," and that "[t]o deny petitioner credit for his time spent in custody between [the two sentencing dates] would render this period 'dead time,' that is, time spent in custody for which he receives no benefit." (*Id*. at p. 20.)

Two periods of time are at issue here. One is the time defendant spent in custody after being sentenced in the Marin action (November 5, 2008) and before the consolidated sentencing hearing in Sonoma County on June 30, 2009. The Attorney General agrees that defendant is entitled to credit for this time, but argues that because defendant was a sentenced inmate, credit for this period should be allocated solely to the

sentence in the Marin action. Defendant concedes the point, and we agree. (See *Marquez, supra,* 30 Cal.4th at p. 21.) The time defendant served between sentencing in the Marin action and the consolidated sentencing hearing in Sonoma County is attributable solely to the Marin action.

The other period of time at issue is that between defendant's arrest in the Marin action and his original Marin County sentencing.[4] Defendant received credit for that time when he originally received a three-year sentence in the Marin action. At the consolidated sentencing hearing in Sonoma County, the sentence in the Marin action became a subordinate term of eight months. As defense counsel pointed out to the court at the time, the credits defendant initially received in the Marin action were based on a longer sentence, and after the consolidated sentencing, the credits for the time he spent in custody before the initial Marin sentencing *exceeded* the eight-month sentence imposed in the Sonoma County consolidated sentencing.[5] Under the rule of *Gonzalez*, as the Attorney General conceded at oral argument, defendant's custody during this time was

[4] The 16 days of custody between the time the CRC hold was placed on December 5, 2007, and his arrest in the Marin action on December 21, 2007, were allocated to the Sonoma cases at the consolidated sentencing hearing.

[5] We reject the Attorney General's contention that defendant waived this point. At an earlier point in the consolidated sentencing hearing, the probation officer and the court discussed whether credits were available for the period from December 2007 through November 2008, and both indicated—apparently misreading the probation officer's memorandum—that credits were not available for that time because defendant was already a sentenced inmate. Defense counsel pointed out that defendant had not been sentenced in the Marin action until November 5, 2008, saying, "So I don't understand why he's not getting—" and pointed out that defendant had been in custody before being sentenced. He then conferred with defendant and said, "I think that we cleared it up, Your Honor." In fact, the probation officer's memorandum stated that credits were not available for this period because they had already been allocated in the Marin action. Later, after the court pronounced sentence, defense counsel argued that the excess credits should "go somewhere," because defendant had more credits than time in that Marin action. We do not read the first colloquy with the court as a waiver of the issue, and conclude that defendant adequately preserved it for review.

attributable both to the Marin action and to the Sonoma County cases, and he is entitled to have those credits apportioned between his sentences in those actions.[6]

The Attorney General's argument that defendant should not have been given work and conduct credit for time spent in inpatient treatment at CRC, however, has merit. As we have explained, the record indicates that in sentencing defendant in the Marin action on November 5, 2008, the Marin County Superior Court awarded him 323 actual days plus 160 conduct days, for a total of 483 days. The probation officer's memorandum to the court at the consolidated sentencing hearing in Sonoma County indicated that defendant spent the time from December 5, 2007, through November 18, 2008, in inpatient care at CRC. "It is settled that a defendant is not entitled to worktime or conduct credits for time served at CRC." (*People v. Nubla* (1999) 74 Cal.App.4th 719, 731.) Defendant concedes, and we agree, that he is not entitled to work or conduct credits for the time he spent as an inpatient at CRC.

Thus, we conclude that defendant is entitled to have his custody credits from the time of his arrest in Marin to his initial sentencing in the Marin action apportioned between the Marin and Sonoma actions. He is not, however, entitled to work and conduct credits for the time he spent as an inpatient at CRC.

B. Retroactivity of Amendments to Section 4019

In supplemental briefing, defendant contends he should receive the benefit of the recent amendments to section 4019, which increase the amount of credit available for

[6] We need not decide whether the Marin offense was the sole cause—or a "but for" cause—of the CRC hold. (See *Bruner, supra,* 9 Cal.4th at pp. 1193-1194 ["[W]here a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a 'but for' cause of the earlier restraint."].) As noted in *Marquez*, this rule applies "in cases involving the possibility of *duplicate credit* that might create a windfall for the defendant." (*Marquez, supra,* 30 Cal.4th at p. 23.) Here, as in *Marquez,* the choice is not between awarding credit once or awarding it twice, it is between awarding credit once or not at all. (*Ibid.*; see also *Gonzalez, supra,* 138 Cal.App.4th at pp. 253-254.)

good behavior and work performance (conduct credit) based on time spent in custody before sentencing.

Under the version of section 4019 in effect at the time defendant was sentenced, as explained in *People v. Landon* (2010) 183 Cal.App.4th 1096, 1105 (*Landon*), "conduct credit could be accrued at the rate of two days for every four days of actual presentence custody. (Former § 1049.) In October 2009, the Legislature passed Senate Bill No. 18 (2009-2010 3d Ex. Sess.) (Senate Bill 18). Senate Bill 18 'addresses the fiscal emergency declared by the Governor by proclamation on December 19, 2008.' (Stats. 2009, 3d Ex. Sess., ch. 28, § 62.) Its provisions provide various means by which prison populations may be reduced, thereby easing prison overcrowding and lowering the cost. This bill, among other things, amended section 4019, effective January 25, 2010, to provide that any person who is not required to register as a sex offender and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c), [will] accrue conduct credit at the rate of four days for every four days of presentence custody."

A split has arisen in the appellate districts regarding whether these amendments are retroactive, that is, whether they are available to inmates who had already been sentenced at the time the amendments went into effect, but whose convictions were not yet final on appeal.[7] In *People v. Otubuah* (2010) 184 Cal.App.4th 422, 432 (*Otubuah*), Division Two of the Fourth Appellate District held that the amendments apply only prospectively. In doing so, it noted the general rule that the Penal Code is not retroactive unless expressly so declared. (§ 3; *Otubuah*, at p. 432.) The court also noted the general rule announced by *In re Estrada* (1965) 63 Cal.2d 740, 745, that an enactment that mitigates punishment for a crime operates retroactively, so that the lighter punishment is

[7] Our Supreme Court has granted review in two cases raising this issue: *People v. Brown* (2010) 182 Cal.App.4th 1354, 1363-1365, review granted June 9, 2010, S181963, in which the Third Appellate District held the amendments were retroactive; and *People v. Rodriguez* (2010) 183 Cal.App.4th 1, 13, review granted June 9, 2010, S181808, in which the Fifth Appellate District held they were not retroactive.

imposed, but distinguished *Estrada* on the grounds that increases to custody credit do not mitigate the punishment for an offense and that the purpose of presentence credits—to encourage good behavior—would not be served by applying the amendment retroactively. (*Otubuah, supra,* 184 Cal.App.4th at pp. 433-435.)

Other districts, however, have concluded that *Estrada* governs the question of the retroactivity of the amendments to section 4019. In *Landon,* Division Two of the First Appellate District concluded that this issue was not significantly different from that in *Estrada,* stating, "In *Estrada,* the amendment at issue lessened the punishment for a group of offenders. Here, the amendment to section 4019 reduces the punishment for a subset of prisoners who have good conduct in jail while awaiting trial. We do not deem it significant that the reduction in time is tied to conduct rather than to a specific offense." (*Landon, supra,* 183 Cal.App.4th at p. 1108.)

In reaching the same conclusion, Division Three of the First Appellate District in *People v. Norton* (2010) 184 Cal.App.4th 408, 417-418, relied in part on *People v. Hunter* (1977) 68 Cal.App.3d 389, 392-393, which concluded that an amendment to section 2900.5 allowing for an award of presentence custody credits lessened punishment within the meaning of *Estrada*, and *People v. Doganiere* (1978) 86 Cal.App.3d 237, 239-240, which applied *Estrada* to an amendment involving conduct credits.[8]

Division Five of the First Appellate District, Divisions One, Six, and Seven of the Second Appellate District, and the Third Appellate District have also concluded that the amendments in question are retroactive. (*People v. Pelayo* (2010) 184 Cal.App.4th 481, 490-491; *People v. House* (2010) 183 Cal.App.4th 1049, 1054-1057; *People v. Delgado* (2010) 184 Cal.App.4th 271, 282-283; *People v. Keating* (June 7, 2010, B210240) ___ Cal.App.4th ___ [2010 Cal.App. Lexis 837, *48-49]; *People v. Weber* (June 7, 2010, C060135) ___ Cal.App.4th ___ [2010 Cal.App. Lexis 839,*46].) Division Four of the Second Appellate District and the Sixth Appellate District, on the other hand, have concluded that the amendments to section 4019 apply only prospectively. (*People v.*

[8] The court in *Otubuah* concluded the reasoning in *Doganiere* and *Hunter* was flawed. (*Otubuah, supra,* 184 Cal.App.4th at p. 434.)

Eusebio (June 18, 2010, B216149) ___ Cal.App.4th ___ [2010 Cal.App. Lexis 911, *3-10]; *People v. Hopkin*s (2010) 184 Cal.App.4th 615, 627.)

We find persuasive the reasoning of *Landon* and the other cases holding that the amendments to section 4019 apply retroactively. We therefore must respectfully disagree with the contrary conclusion reached in *Otubuah, Eusebio,* and *Hopkins*. Upon remand, to the extent defendant is entitled to conduct credits, the court shall recalculate those credits under amended section 4019.

C. Restitution and Parole Revocation Fines

Defendant contends that at the consolidated sentencing hearing, the court violated the rule of *People v. Chambers* (1998) 65 Cal.App.4th 819 (*Chambers*) in imposing restitution fines in the three Sonoma County actions. As we have explained, restitution fines pursuant to section 1202.4 and parole revocation fines pursuant to section 1202.45 had already been imposed in all three cases: at the time the court suspended imposition of sentence in the 2002 Sonoma case (case No. SCR-31810), the court imposed $200 restitution and parole revocation fines; in sentencing defendant in the 2003 case (case No. SCR-32983), the court again imposed $200 restitution and parole revocation fines; and in sentencing defendant in the 2006 case (case No. SCR-472859), the court imposed $660 restitution and parole revocation fines. At the 2009 consolidated sentencing hearing, the court imposed restitution and parole revocation fines in different amounts: $400 in case No. SCR-31810, $1,000 in case No. SCR-32983, and $600 in case No. SCR-472859.

Chambers held that "a restitution fine imposed at the time probation is granted survives the revocation of probation," and that a second restitution fine imposed when probation is revoked is unauthorized. (*Chambers*, *supra*, 65 Cal.App.4th at pp. 820-821; see also *People v. Downey* (2000) 82 Cal.App.4th 899, 921 [at sentencing, trial court improperly imposed restitution and parole revocation fines in amount larger than that imposed when appellant placed on probation].) As stated in *People v. Garcia* (2006) 147 Cal.App.4th 913, 917, "A restitution fine imposed at the time of conviction and granting of probation remains the same despite a future revocation of probation. Therefore, when

probation is revoked, the trial court has no authority to impose a second restitution fine in a greater amount than the original fine."

The Attorney General concedes that, as to the 2002 and 2003 Sonoma cases (cases Nos. SCR-31810, SCR-32983), the restitution and parole revocation fines imposed in the consolidated sentencing hearing—which were greater than those originally imposed—violated the rule of *Chambers*. We agree, and shall order them stricken. (See *Chambers*, *supra*, 65 Cal.App.4th at p. 823.)

The parties disagree, however, on the propriety of the court's actions with respect to the fines in the 2006 Sonoma case (case No. SCR-472859). At the original sentencing in that action, the trial court imposed sentence not only in that action, but also in the 2002 Sonoma case (case No. SCR-31810) and ordered the previously suspended sentence in the 2003 Sonoma case executed (case No. SCR-32983), before suspending execution of sentence and ordering $660 restitution and parole revocation fines. Defendant contends that in imposing the $660 fines, the court intended to impose $200 restitution and parole revocation fines for each of the three Sonoma cases, along with a 10 percent administrative fee, and that the abstract of judgment should accordingly be amended to reflect $200 fines. Nothing in the record, however, indicates that the court at the 2006 sentencing hearing intended only $200 of the fines to apply to case No. SCR-472859, or that $60 of the fine represented an administrative fee.[9] Accordingly, we reject defendant's argument. Under the rule of *Chambers*, the $660 restitution fine survived the revocation of probation. (*Chambers*, *supra*, 65 Cal.App.4th at pp. 820-821.) The court's

[9] Section 1202.4, subdivision (b) requires the court to impose a separate and additional restitution fine, unless there are compelling reasons not to do so. Section 1202.4, subdivision (*l*) authorizes the board of supervisors of a county to impose an administrative fee of up to 10 percent to cover the costs of collecting the restitution fine. (See *People v. Robertson* (2009) 174 Cal.App.4th 206, 211.) Section 1202.45, which directs the trial court to impose a parole revocation restitution fine "in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4," does not contain a similar provision for an administrative fee. Thus, the fact that the court in case No. SCR-472859 ordered $660 fines under *both* section 1202.4 and section 1202.45 undercuts defendant's argument that the $660 fine was intended to include a 10 percent administrative fee.

imposition of a $600 fine at the consolidated sentencing in Sonoma County was unauthorized, and the fine must be stricken. (*Id*. at pp. 821, 823.)

III. DISPOSITION

The matter is remanded to the trial court. On remand, the court shall recalculate defendant's custody credits in a manner consistent with this opinion. It shall also strike the restitution and parole revocation fines of $400 in case No. SCR-31810, $1,000 in case No. SCR-32983, and $600 in case No. SCR-472859. The restitution and parole revocation fines originally imposed remain in force. The trial court is directed to prepare an amended abstract of judgment in accordance with this disposition and deliver it to California's Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

_____
RIVERA, J.

We concur:

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RUVOLO, P.J.

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SEPULVEDA, J.